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Text

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 1288

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA.

BRIEF FOR PETITIONER

OPINIONS BELOW

There were no reported opinions below. We are attaching hereto as an appendix:

1. The decision of the Appellate Department of the Superior Court of the State of California, County of Orange

(CT 212)*;

2. Notice of Denial of Appellant's Petition for Certification to the Court of Appeal, Fourth Appellate District, and the Denial of his Petition for Rehearing (CT 280).

JURISDICTION

This was a criminal prosecution wherein, during the course of trial and on appeal, there was drawn a question of the validity of the statutes of the State of California as hereinafter noted, on the ground that they were repugnant to the United States constitutional laws. The affirmation of the judgment of conviction by the Appellate Department of the Superior Court constituted a decision in favor of the validity of the statutes challenged.

The judgment of the Appellate Department of the Superior Court was entered on October 12, 1970. The timely Petition for Rehearing was denied on November 2, 1970. Notice of Appeal was filed on November 6, 1970. Probable jurisdiction was noted by this Court on March 29, 1971.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(1)(2). Cases which support this appeal are: *Giaccio v. Pennsylvania,* 382 U.S. 399, (1966); *Screws v. United States,* 325 U.S. 91, (1943); *Lanzetta v. New Jersey,* 306 U.S. 451, (1939); *Connally v. General Construction Co.,* 269 U.S. 385, (1926).

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*(CT refers to Clerk's Transcript.)

QUESTIONS PRESENTED

1. The courts below have construed California Penal Code Section 311.2 to allow the use of a "statewide" standard to establish the "contemporary community standards" component of the *Roth-Memoirs*[1] test for obscenity, in a prosecution for distributing allegedly obscene printed material. The questions presented are: Whether under the First and Fourteenth Amendments a "national standard" is a necessary criterion for establishing "contemporary community standards."

2. Whether under the Commerce Clause of the United States Constitution, a "national standard" is necessary in order to avoid unconscionable burdens on the free flow of interstate commerce.

3. Whether the state prosecution under California Penal Code Section 311.2 for "distribution," where the distribution was in fact a "mailing" of the materials, constituted a violation of the doctrine of federal pre-emption and was thus in direct conflict with the Supremacy Clause of the United States Constitution.

4. Whether the determination of the "customary limits of candor" of a relevant community, for the purpose of establishing obscenity, if based upon expert opinion which is substantially derived from an unscientifically designed survey which is not purged of economic and ideological bias, is violative of the First and Fourteenth Amendments.

5. Whether the conviction of petitioner for violation

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1 *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

of California Penal Code Section 311.2 was egregious error because, as a matter of constitutional law, the materials were not obscene.

6. Whether the state may convict petitioner under the language of a statute which was amended after the offense for which the petitioner was charged took place, and which imposed a *scienter* definition which was easier for the prosecution to establish, without violating the constitutional prohibition against *ex post facto* law.

STATUTES INVOLVED

Sections 311 and 311.2 of the California Penal Code have been set forth in the appendix attached hereto.

STATEMENT OF THE CASE

Petitioner was convicted of causing to be mailed obscene matter in violation of California Penal Code Section 311.2. The allegedly obscene matter consisted of five advertising brochures for various books and a movie. Pictures on the brochures were in no way more explicit than comparative material which was contained in books sold throughout the state of California in reputable book stores. Some of the pictures on the brochures were identical to those sold in the state. (CT 175, 176.)

The prosecution's witness on the issue of redeeming social value admitted that the materials at issue in this case had "some content" and some usefulness (CT 176). The petitioner's witnesses both explicitly detailed the value of the materials (CT 177).

On the issue of contemporary community standards, the prosecution put on only one "expert" witness, a police officer, Shaidell, who was assigned to the Vice Division of the Los Angeles Police Department. The officer made no representation that his alleged expertise extended beyond his ability to testify as to community standards in the state of California (CT 172-175).

The officer had conducted a "survey" on people's reactions and viewpoints towards obscenity in the state of California (CT 173). It is clear that even though Officer Shaidell had been a vice officer, his greatest credibility as an expert to speak out on "statewide" standards was based upon the survey which he had conducted. The testimony of Officer Shaidell was replete with admissions that pointed to the defectiveness of his survey (CT 173-175). The officer was not sure his survey was even scientific (CT 174). Moreover, it was abundantly clear that his method of gathering a cross-section of people to survey was not objective and was decidedly overweighted to show the attitude of groups who would be more likely to have conservative views. Neither did Officer Shaidell try to get a balanced socio-economic representation in the survey (CT 174-175).

Thus, not only was there not a national standard applied to measure "contemporary standards," but even the use of state standards was tainted in this case by the fact that the prosecution's only expert witness on this issue was allowed to bootstrap himself into credibility by relying on the results of a survey which could only muster a pathetic semblance of objectivity.

In fact, the prosecution was never able to produce unequivocal evidence from its own witnesses which would

support the conclusion that the materials involved here were obscene (CT 174-177).

SUMMARY OF THE ARGUMENT

1. That part of the decision of *Roth v. United States, supra,* requiring as a necessary component of the definition of obscenity that the material go beyond "contemporary community standards," has been unmodified by subsequent decisions of this Court. The majority of the states which have attempted to decide whether the "community" referred to in *Roth* required a "national" or a "statewide" standard, have followed the lead of Justice Brennan's decision in *Jacobellis v. Ohio,* 378 U.S. 184, 192-193, and have concluded that a "national" standard is necessary. The time has passed since we can indulge the fantasy that, with regard to precious First Amendment guarantees, this Court meant that the word "community" was to be understood in its most parochial sense. As a "preferred" right, the First Amendment guarantee of freedom of expression must be protected from erosion, by demanding that any state's regulation of obscenity be restricted to the least detrimental of reasonable alternatives open to the state. In this case, both the state's interest in protecting the morals and general welfare of its citizens, as well as the constitutional interest in promoting freedom of expresson, can both be best served by adopting a "national standard."

2. Separate and apart from the dictates of the First and Fourteenth Amendments is the question of the impact of the Commerce Clause upon the question of which "standard" is the most appropriate. There can be no doubt that

the emanantions of the Commerce and Supremacy Clauses are instrumental to the preservation of federal interests from encroachments by the states. Where, as here, we are dealing with printed materials that can be nationally distributed, it is clear that any control of such material raises issues pertinent to the Commerce Clause. The sales of printed materials, as well as the sheer volume of pamphlets, books, magazines, etc., which are in circulation throughout the country, indicate that this is an area of sizable impact upon interstate commerce. Were the individual states allowed to curtail distribution, circulation or entry of printed materials into or within their borders, through the imposition of "state standards" for defining obscenity, then there would be an unconscionable deleterious effect upon interstate commerce. Thus, the effect of the Commerce Clause, acting independently of the First Amendment, requires the adoption of the "national standard."

3. The petitioner was convicted for the distribution of allegedly obscene materials, which was effectuated through the mails. It is clear that Congress intended that all prosecutions for the distribution of obscene materials through the mails be controlled by federal law. 18 U.S.C. Sections 1461, 1462, 1465. Recent decisions of the Court have illustrated the precision that is necessary in laws which seek to penalize an individual for distribution of allegedly obscene materials through the mails. Even obscene materials may, under some circumstances, be permissibly transmitted through the mails. In the light of a pre-emptive federal plan, as exists in this context, the state of California should not be permitted to erode the constitutional desire for uniformity by the simple expedient of arguing that the state has the

power to control "distribution" and that nothing in the state statute explicitly refers to "mailing." The state is clearly empowered to control the "distribution" of obscene materials within its borders; however, "distribution" is a portmanteau term which encompasses many possible activities, e.g., mailing, shipping, handing out, etc. Here, we are precisely concerned with an impermissible application of "distribution" so that it can be used to regulate "mailing." When the federal government has passed legislation which controls one method of distribution, then, to that extent, the federal law pre-empts the state power to adopt or enforce laws which seek to regulate that specific method of distribution.

4. The California State Supreme Court, in the case of *In re Giannini,* 69 Cal.2d 563 (1968), stated that the prosecution was compelled to introduce "expert" testimony as to what the customary limits of candor were for the state of California. In this case, the expert, who was a Vice Division police officer, indisputedly gathered the greatest part of his credibility and persuasiveness from a survey which he had administered throughout the state. This Court has before sounded a cautionary note when confronted by survey results. *Witherspoon v. Illinois,* 391 U.S. 510, 517-518 (1969). Here, the survey was pathetically inadequate, administered by a police officer who revealed himself as such to the people being questioned, and the large proportion of the survey group consisted of members of fraternal groups and other organizations which had requested the officer speak on the problem of obscenity. There was therefore a strong likelihood that these people would be less tolerant than the community as a whole. In any case,

there is no way of knowing how much weight the jury gave to Officer Shaidell's credibility because of the authority of the survey, and in such a case it is hard to say that the introduction of his testimony was harmless error.

5. Based on the number of per curiam reversals by this Court based on *Redrup v. New York,* 386 U.S. 767, it is clear that the materials upon which petitioner's conviction rested were no worse than comparable materials which this Court has, on numerous occasions, found protected. Thus, in this case, we have a conviction based on non-obscene material. Moreover, due to the defectiveness of the expert witness in this case, it is clear that the prosecution did not even establish the requisite elements necessary for the definition of obscenity as articulated in *Roth-Memoirs, supra.*

6. Petitioner was indicted and convicted under the language of California Penal Code Section 311(e), which was amended after the time that the offense charged took place. The new language of the Penal Code altered the "*scienter*" requirement so as to make it easier for the prosecution to establish its case. This application of the language of the subsequently amended Penal Code was the imposition of an *ex post facto* law and, hence, unconstitutional. *Calder v. Bull,* 3 U.S. 386 (1798).

ARGUMENT

I

Whether In A Prosecution For The Distribution Of Obscene Printed Materials, Pursuant To California Penal Code Section 311.2, The Use Of A Statewide Standard To Establish Contemporary Community Standards Component Of The *Roth-Memoirs* Test For Obscenity Is Violative Of The First And Fourteenth Amendments.

In *Roth v. United States,* 354 U.S. 476, this Court stated that material is obscene if, applying contemporary community standards, the dominant theme of the materials, taken as a whole, appeals to prurient interest. *Id.* at 489.

Although a plurality opinion in *Memoirs v. Massachusetts,* 383 U.S. 413, 418, attempted to modify the *Roth* test as follows:

> ". . . Three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matter; and (c) the material is utterly without redeeming social value."

(see, also, *Redrup v. New York,* 386 U.S. 767, 770-771), it is clear that the concept of contemporary community standards is an essential component for the definition of obscenity under either test.

In the case of *In re Giannini,* 69 Cal.2d 563, 574, the

California Supreme Court interpreted the words "customary limits of candor," as used in Penal Code Section 311, to require a showing that the material affronts contemporary community standards of decency, i.e., the California court equated the language of Penal Code Section 311 to the requisite enunciated in *Roth, supra,* and reiterated in *Memoirs, supra.*

Moreover, the *Giannini* court held that in order to support a conviction, the prosecution must introduce expert testimony upon the elements of "community standards."[2]

Here, on the issue of contemporary community standards, the prosecution put on only one expert witness, a police officer, Shaidell. The officer made no representation that his alleged expertise extended beyond his ability to testify as to the community standards in the state of California (CT 172-175). It is petitioner's contention on appeal that the application of Penal Code Section 311 and Section 311.2 to permit a statewide standard rather than a national standard to measure and establish whether printed material affronts contemporary community standards of decency is violative of the First and Fourteenth Amendments.

(A) Mr. Justice Harlan pointed out in *Manual Enterprises v. Day,* 370 U.S. 478, at 488, that a standard based

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2 *Cf., Smith v. California,* 361 U.S. 147, 180 (J. Frankfurter, concurring); *United States v. Klaw,* 350 F.2d 155 (2d Cir. 1966); *House v. Commonwealth,* 210 VA. 121, 169 S.E.2d 572; *Duggan v. Guild Theatre, Inc.,* 436 Penn. 191, 258 A.2d 858; *Dunn v. State Board of Censors,* 240 MD. 249, 213 A.2d 751; *Hudson v. United States,* D C App., 234 A.2d 903; *Ramirez v. State,* 430 P.2d 826; *City of Phoenix v. Fine,* 4 Arizona App. 303, 420 P.2d 26; *In re Seven Magazines,* 268 A.2d 707.

on a particular local community would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." *Cf. Butler v. Michigan,* 352 U.S. 380.

That observation, as to the deleterious consequences of employing any standard less than a national standard, is the crucial starting point from which all analysis must commence. Justice Harlan finds that in the context of federal statutes the national standard is compelled because of the unremitting dictates of the First Amendment. However, in the context of state statutes, less than a national standard is permissible, notwithstanding the same deleterious effect stated, because the First Amendment is made applicable to the states through the Fourteenth Amendment and the word "liberty" in the Fourteenth Amendment incorporates only as much of the restraints contained in the particular amendment as is essential to the concept of "ordered liberty." *Palko v. Connecticut,* 302 U.S. 319 (1937).

Justice Brennan has of course presented the major defense for the proposition that the only relevant community is the "national" community. *Jacobellis v. Ohio,* 378 U.S. 184, 192-193.[3]

Thus, at its simplest formulation, the dispute comes down to whether the First Amendment demands a rule of uniform application irrespective of state lines,

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3 45 Minnesota Law Review at 108-112; ALR, Proposed Official Draft (May 4, 1962) Section 251.4(4)(d); Tentative Draft No. 6 (May 6, 1957) at 45.

Pennekamp v. Florida, 328 U.S. 331, 335, or whether a residual police power of the various states is to be the predominating influence so long as it is exercised within the perimeters circumscribed by the Due Process Clause of the Fourteenth Amendment.

It is clear that under *Roth, supra,* and *Memoirs, supra,* the classification of material as obscene, under either test, is dispositive of the constitutional issue. That classification is of course to be made by the original trier of fact at the trial level. Now, to the extent that reviewing courts are deferential to that original judgment, by adopting non-stringent standards of review, the courts will encourage easy labeling and jury verdicts rather than compelling a facing up to the difficult individual problems of constitutional judgment involving every obscenity case. *Roth, supra,* 354 U.S. at 497.

Thus, the majority opinion in *Roth, supra,* only retains vitality and believability as long as this Court continues to scrupulously scrutinize lower court judgments in obscenity prosecutions. Justice Brennan, in *Jacobellis, supra,* 378 U.S. at 190, note 6, stated:

> "Nor do we think our duty of constitutional adjudication in this area can properly be relaxed by reliance on a 'sufficient evidence' standard of review. Even in judicial review of administrative agency determinations, questions of 'constitutional fact' have been held to require *de novo* review. *Ng Fung Ho v. White,* 259 U.S. 276, 284-285; *Crowell v. Benson,* 285 U.S. 22, 54-65."

It seems manifestly clear that this Court, when making its *de novo* determination as to the obscenity *vel non* of materials, employs a national standard as the criterion for community standards. See *Redrup v. New York, supra,* and the subsequent *per curiam* reversals based on *Redrup.*

It makes little sense to allow lower courts to arrive at a determination of obscenity based on "statewide" standards and then have this Court, upon the final review, employ a different standard, i.e., a national standard.

(B) Moreover, the argument is not ultimately persuasive that this Court, when it articulated the First Amendment definition of obscenity, *Roth, supra,* meant the word "community" to refer to anything less than a national community. See *Jacobellis, supra,* 378 U.S. at 192-193.

A canvassing of the decisions of various state supreme courts indicates that many, on their own initiative, without clear and unequivocal statements by a majority of this Court, have felt obliged to adopt the "national standard" test.[4]

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4 *Robert Arthur Management v. Tennessee,* 414 S.W.2d 638 (1967) [Tenn. Supreme Court]; *State v. Smith,* 422 S.W.2d 50 (1967) [Mo. Supreme Court]; *State v. Hudson County News Company,* 41 N.Y. 247, 262-266 (1963) [N.J. Supreme Court]; *In re Seven Magazines, supra,* 268 A.2d 707, 709 (1970) [R.I.Supreme Court]; *State Ex Rel v. A Quantity of Copies of Books,* 197 Kans, 306, 310 [Kans. Supreme Court]; *People v. Stabile,* 58 Misc. 2d 905 (1969) [N.Y. Supreme Court]; *State v. Childs,* 252 Ore. 91, 98 (1968) [Oregon Supreme Court suggested national standard]; *Duggan v. Guild Theatre, Inc., et al.,* 436 Pa. 191, 201, n. 7 (1969) [Pennsylvania Supreme Court indicates national standard]; see, also, *Interstate Cir., Inc. v. City of Dallas,* 402 S.W.2d 707 [Texas Court of Appeals suggests national community]; *Hudson v. United States,* 234 A.2d 903 [D.C. Appellate, 1967, suggests national community]. But, *cf., Gent v. State,* 393 S.W.2d 219 (1965) [Ark. Supreme Court indicates *local standard,* i.e., city]; *City of Youngstown v. DeLoreto,* 251 N.E.2d 491 (1969) [Ohio Court of Appeals suggests *state standard*].

When this Court has recognized fundamental rights in the Fourteenth Amendment *without* specific reliance upon the Bill of Rights, the language of "community" (and analogous expressions) was clearly meant to refer to a "national community."[5] It seems therefore, *a fortiori,* that where, as here, the Fourteenth Amendment makes applicable the First Amendment to the states, which is after all a "preferred right," the term "community" must also be understood to mean a national community.

(C) It is also important for this Court to reach a decision which provides the greatest degree of adaptability and utility to the emerging and progressive tendencies of our society. It is clear that the trend in our society is toward greater proliferation, both of data and of artistic and marginally artistic works. Moreover, the trend is also towards greater access to data through retrieval systems and channels of mass media, and wider and speedier dissemination of printed, written and cinematic materials of all kinds.

The countenancing of a "state standard" by this Court simply permits the least progressive sections of our country to resist and impede change, and to prohibit other members of the society–unfortunate enough to reside in those regressive areas–the opportunity to avail themselves of materials tolerated by the rest of the nation.

Thus, the adoption of a state standard by this Court would have the unfortunate tendency of impeding

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5 *Rochin v. California,* 342 U.S. 165; *Snyder v. Massachusetts,* 291 U.S. 97; *Malinski v. New York,* 324 U.S. 401, 417; *Haley v. Ohio,* 332 U.S. 596, 604; *Wolf v. Colorado,* 338 U.S. 25; *Betts v. Brady,* 316 U.S. 455; *Griswold v. Connecticut,* 381 U.S. 479.

the desirable evolutionary tendency in our society towards the permitting of greater access and utilization of the most current thoughts and works produced in our country, or, for that matter, in the world.

II

The Use Of A Statewide Standard In The Application Of Penal Code Section 311.2 To A Prosecution For Distributing Purportedly Obscene Printed Materials Was In Violation Of Article I, Section 8, Of The United States Constitution.

Under Article I, Section 8, Clause 3, Congress was granted the power "to regulate commerce . . . among the several states . . . ."

Petitioner contends that the application of a statewide standard to determine community standards, in the application of Penal Code Section 311.2, conflicts with the free flow of commerce throughout the United States and, therefore, this application by the State of California of Penal Code Section 311.2 must be avoided because of its collision with the Commerce Clause.

It is indisputable that the application of a statewide standard by California in pursuance of Penal Code Section 311.2 has an impact on interstate commerce. Books, films, magazines, etc., which are capable of transportation from state to state, would have to be altered in order to conform to the "state" standard in order to avoid prosecution; alternatively, a wholesaler or distributor or exhibitor would have to forebear dealing with certain books or films, etc. This application of Penal Code Section 311.2 thus has

a sufficient impact on the flow of commerce so as to bring it within the purview of the Commerce Clause, even though the application has an indirect effect.

> "Although the Commerce Clause conferred on the national government the power to regulate commerce, its possession of the power does not exclude all state power of regulation . . . . In the absence of conflicting legislation by Congress, there is a residual power in the states to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even to some extent regulate it . . . . But, ever since *Gibbon v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824), *the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.*"
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> *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (Emphasis added).

The states are not wholly precluded from exercising their police power in matters of local concern, even though they may thereby affect interstate commerce. *Edwards v. California,* 314 U.S. 160, 172-173.

The precise degree of the permissible restriction on state power cannot be fixed generally, or, indeed, not even for one kind of state legislation, such as taxation or health or safety. *Morgan v. Virginia,* 328 U.S. 373, 377. Generally, the courts have been willing to uphold state regulations

designed for the protection of public health and welfare, even though these regulations have some affect on interstate commerce. Of course, *the burden must nevertheless be found not to be unreasonable. Head v. New Mexico Board of Examiners,* 374 U.S. 424.

Thus, state legislation is invalid if it unduly burdens interstate commerce in matters where uniformity is necessary–necessary in the constitutional sense and useful in accomplishing a permitted purpose. *Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 766-771; *Morgan v. Virginia, supra,* 328 U.S. at 377; *Cooley v. Board of Wardens,* 12 Hod. 299, 319.

As a general proposition, it can be said that because of the nature of the federal system and the emanations from the Supremacy Clause (see *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316), even where Congress has not acted, the Commerce Clause still prohibits the states, through the exercise of their police power, to impose directly or indirectly an "unreasonable burden" on interstate commerce. *Cooley v. Board of Wardens, supra; South Carolina Highway Department v. Barnwell Bros.,* 303 U.S. 177, 184; *Southern Pacific Co. v. Arizona, supra.* Obviously, the states may impose some burden on the flow of commerce. The question is always whether in the individual instance the burden imposed is so great as to be unreasonable. The court must utilize the balancing of interests. It must balance, on the one hand, the policies and benefits deriving from the state regulation against the nature and extent of the burden which that state regulation has upon interstate commerce. The Supreme Court's general rule for determining the validity of state laws affecting commerce is the following:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities.*"
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> *Pike v. Bruce Church, Inc.*, 90 S.Ct. 844, 847 (1970).

Clearly, in this instance, the state has a sufficient interest in the protection of the morals of its citizens so as to prohibit the distribution of obscene materials within the state.[6] However, that interest could be just as well protected by the utilization of a national standard, rather than a statewide standard, when applying Penal Code Section

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6 In terms of the regulation of pornography, the state interests in suppression have been normally articulated as follows: 1) the protection of juveniles; 2) the protection of adults from degenerate influences; 3) the protection of the public from intrusions on their sensibilities, and incitements to anti-social conduct; the protection of individual adults from intrusions on their sensibilities, and from incitements to anti-social conduct. See *Stanley v. Georgia*, 394 U.S. at 565; Katz, *Privacy and Pornography*, 1969 Supreme Court Review, 203, 206-207. The argument as to anti-social behavior was dismissed in *Stanley v. Georgia*, 394 U.S. at 566, where the Court said: "There appears to be little empirical basis for that assertion." The argument as to degenerative influence was also discussed in *Stanley*, 394 U.S. at 565, where the Court said: "We are not certain that this argument amounts to anything more than the assertion that the state has the right to control the moral contents of a person's thoughts." Thus, by a process of elimination, this Court has tended to indicate that the only legitimate interests the state has in the suppression of pornography is the protection of juveniles and the protection of adults from intrusions upon their sensibilities. See, also, *Redrup v. New York, supra.*

311.2 in the prosecution of materials which can be or have been disseminated widely throughout the United States, i.e., films, books, magazines and other printed materials.

This utilization of a statewide standard imposes upon the distributors of such materials the oppressive burden of tailoring products to meet the vagaries of local censorship and the particular sensibilities of the individual states. In such a case, the local rule should be discarded because of its adverse effect on the free flow of commerce.[7] *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520.

Thus, even assuming *arguendo* that when viewed *solely* from the perspective of the First and Fourteenth Amendments the various states have broader power to regulate speech than the federal government, that regulatory power to the states is not so broad when the Commerce Clause comes into play. In such a case, a national standard is required because of the emanations of the Supremacy Clause which operates as an instrument of federalism. Thus, although in strictly First and Fourteenth Amendment context the argument is entertainable that there are different standards appropriate for the federal government and the various states, under the Commerce Clause and Supremacy Clause that argument loses much vitality. In fact, any analysis based upon the distribution of powers between the federal government and state governments would then indicate that the federal power must be pre-emptive, i.e., that a national standard is necessary.

Clearly, the right of persons to exhibit and distribute materials, ostensibly under the protection of the First Amend-

7 It is clear that *some* states do in fact adopt national standards while other states adopt some lesser standards. See, *supra*, note 4.

ment, from state to state, free of unconscionable obstacles, occupies a more protected position in our constitutional system than does the movement of mere cattle, fruit, steel and coal across state lines. We are dealing with a fundamental right protected by the First Amendment, and in this situation the material takes on an even more sheltered and favorable position under the Commerce Clause. Inhibition, as well as prohibition against the exercise of precious First Amendment rights, is a power denied the government. *Freedman v. Maryland,* 380 U.S. 51; *Garrison v. Louisiana,* 379 U.S. 64; *Speiser v. Randall,* 357 U.S. 513.

Many times in the past, the Commerce Clause has been utilized to enforce and vindicate private rights and personal liberties in the face of state regulations, which either directly or indirectly, on their face or through their application, sought to violate those rights and liberties, e.g., freedom of movement, freedom of association, etc. See *Edwards v. California,* 314 U.S. 160; *Robbins v. Shelby County Taxing District,* 120 U.S. 489; *Ward v. Maryland,* 79 U.S. (12 Wall.) 418; *Crandall v. Nevada,* 73 U.S. (6 Wall.) 35.

In effect, the application of Penal Code Section 311.2 in this manner adversely affects the liberty of the circulation of materials protected under the First Amendment. As Mr. Justice Hughes said in *Lovell v. Griffin,* 303 U.S. 444, 452:

> "Liberty of circulation is as essential to that freedom [First Amendment freedom of the press] as liberty of publishing; indeed, without the circulation, publication would be of little value."

III

The State Prosecution Under California Penal Code Section 311.2 For Mailing Obscene Material Constituted Error Because Federal Law Has Completely Pre-empted The Field.

The prosecution by the state for distributing allegedly obscene materials (when, in fact, the distribution is a "mailing"), under a state statute, is repugnant to the United States Constitution, Article I, Section 8, Clause 7, under which Congress pre-empted the regulatory field by enacting the Federal Obscenity Law which specifically punishes the mailing or advertising by mail of obscene materials. This result is entirely consistent with *Roth v. United States,* 354 U.S. 476 (1957), in which the Court upheld the state's power to punish the keeping for sale of obscene material, or even advertising such materials, since these were essentially local activities and did not necessarily involve the obstructing of the mails. *Roth, supra,* at 494-500.

Congressional power over the mails is practically plenary. United States Constitution, Article I, Section 8, Clause 7; *Donaldson v. Reed Magazines,* 333 U.S. 178 (1948); *Hinds v. Davidowitz,* 312 U.S. 52 (1941); *Milwaukee Publishing Co. v. Burleson,* 254 U.S. 407 (1921); *In re Debs,* 158 U.S. 564 (1895). Moreover, it is clear that Congress has fully legislated in the field. 18 U.S.C. Sections 1461, 1462, 1465.

Under 18 U.S.C. Section 1461,

> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be non-mailable, or

> knowingly causes to be delivered by mail according to the direction thereon, or at the place to which it is to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof . . . "

is guilty of a crime.

Thus, the conclusion is inescapable that Congress has intended to occupy completely this field of obscenity in the context of mailing. A state obscenity law touching the mailing of obscene matter is superseded regardless of whether it merely purports to supplement federal law.

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition as state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."
>
> *Charleston and Western Carolina Railroad Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1917).

Moreover, in this context, the federal government has an even more acute interest because of the involvement of First Amendment rights. The federal government has an overriding interest to protect the free flow of mails and the free flow of communication from the blockage and disruption which would arise if every state were permitted to apply a variable standard to determine obscenity, i.e., a standard pegged, as here, to a statewide test of community standards rather than nationwide standards.

The First Amendment guarantee of freedom of the

press and expression, of course, comprehends every sort of publication which affords a vehicle of information and opinion. This liberty is protected at every step in the process of creation, publication and circulation, from the writing and printing of the words until the material reaches the hands of the ultimate reader.

It would be awkward, to say the least, to have materials traveling through the mails change their character from obscene to non-obscene as they pass from one state to another. In this area, it is thus clear that the government must speak with one voice. This is only possible if the federal government standard for obscenity is uniformly applied in the context of the mailing of materials of this purported character. See *Commonwealth v. Gordon,* 66 D.C. 101, 136 (Pennsylvania, 1949).

The Congress has spoken, and this must be considered the last word on the subject. Title 18, U.S.C., Sections 1461-1465, completely pre-empts the field with regard to the punishment for the mailing of obscene materials. It is of absolutely no avail to the states to say that they have the inherent power to regulate distribution of obscene materials, when it is clear that what they mean by distribution is "mailing."

IV

The Determination Of The Contemporary Community Standards For The Purpose Of Establishing Obscenity, If Based Upon An Unscientific Survey, Is Violative Of First And Fourteenth Amendments And The Sixth Amendment To The United States

Constitution.

One of the necessary requisites for showing that material is obscene is that it is patently offensive because it affronts contemporary community standards relating to the description of sexual matters. *Memoirs v. Massachusetts, supra.* In California, this constitutional requisite would have had to be embodied in the language of Penal Code Section 311, which refers to "customary limits of candor." *Giannini, supra,* 69 Cal.2d at 574. It is clear that failure to introduce proof of contemporary community standards is reversible error. *In re Giannini, supra.*

The prosecution offered the testimony of only one witness to prove that the material was substantially beyond the community standards. As will be shown, that "expert" witness was totally unqualified; hence, as a matter of law, the conviction must be overturned because there was insufficient evidence to establish a crucial element.

The prosecution put an Officer Shaidell on the stand to give his expert opinion on the question of whether the materials involved in the trial went beyond the customary limits of candor in the community. To show that he was familiar with the standards of the whole community, which was absolutely necessary to qualify him to give his opinion on this matter, the prosecution established that he had conducted a state survey on the question of what the community "felt" was beyond the customary limits of candor. (RT*, Volume III, Section 1, pages 116-117.)

Petitioner contends that admitting the introduction of Officer Shaidell's opinion testimony as an expert, based on

*(RT refers to Reporter's Transcript.)

this survey, was prejudicial and constituted reversible error.

It is clear that allowing the essential requisite that the material be shown to be "substantially beyond the customary limits of candor," as stated in Penal Code Section 311 and applied in Penal Code Section 311.2, be proved by the egregiously non-objective evidence would be violative of the First and Fourteenth Amendments. The California Supreme Court, in *In re Giannini, supra,* made clear that "we must achieve so far as possible the application of an objective, rather than subjective, determination of community standards." 69 Cal.2d at 574-575.

Although it is clear that the proof of the community standards must be objectively based, petitioner is not arguing that the court must demand some absolute unrealistic demonstration of objectivity that would make prosecution and conviction impossible. However, the petitioner is maintaining that where an expert is permitted to testify on community standards on the basis of a survey which is egregiously and patently defective, and where that testimony is the only prosecution evidence introduced to prove the requisite that the material goes substantially behind the customary limits of candor of the community, then, in effect, there was no expert testimony and the First and Fourteenth Amendments would require that the conviction be reversed.

Two basic requirements must be met before opinion polls are to be given probative weight: (1) Necessity; and (2) Trustworthiness. *Smith v. State,* 268 N.Y.S.2d 873, 49 Misc.2d 985 (1966); *Zippo Manufacturing Co. v. Rogers Imports, Inc.,* 216 F.Supp. 670 (S.D.N.Y. 1963). In *Miles Laboratory, Inc. v. Frolich,* the court admitted a survey after there was testimony by an independent expert that

the method of "testing and sampling and selecting and training interviewers was as fair and reasonable as could be devised," 195 F.Supp. 256, 262 (S.D. Cal. 1961). *Cf.* Barksdale, *The Use of Survey Research Findings as Legal Evidence,* 31-33 (1957).

If, in order for the results of an opinion survey to be probative, it is necessary to show that the methodology used to construct and conduct the survey was scientifically sound, then, *a fortiori,* the expertise of the purported expert rendering an opinion based on the results of the survey can also only be established by showing that validity of the survey. In the area of the First Amendment, the state is constitutionally compelled to adopt regulations, standards or methods which are the least intrusive and the most narrowly circumscribed available for the accomplishment of its legitimate purpose. *Butler v. Michigan, supra,* 325 U.S. 380.

By these standards, it is clear that the survey used in this case to qualify Officer Shaidell was defective. By no stretch of the imagination could Officer Shaidell be deemed a valid expert, capable of rendering a valid and objective opinion as to "community standards."

There are several grounds upon which the petitioner argues that the survey used was defective:

(1) Officer Shaidell surveyed an unrepresentative group of people in the state. He paid no attention to the distribution of the people among the counties he surveyed (RT, Volume III, Section II, pages 20-21); he did not pay attention to the economic status of those surveyed (RT, Volume III, Section II, page 13); he chose groups to interview which were particularly middle of the road and

establishmentarian, e.g., church groups, PTA, Naval Reserve units, fraternal organizations (RT, Volume III, Section II, page 11);

(2) The questions asked were not scientifically selected to test for the information desired to be ascertained (RT, Volume III, Section II, pages 12-15);

(3) In his questioning of subjects, he did not ask them whether the material went "substantially" beyond the customary limits of candor (the exclusion of that word alone, which is contained in Penal Code Section 311, could have significantly invalidated the relevance of that survey);

(4) The very fact that the survey was conducted by a police officer who identified himself as such to the subjects interviewed was arguably sufficient to distort and bias the responses.

Thus, on these facts, it is apparent that Officer Shaidell's credentials, based upon that survey, are woefully defective. Permitting a conviction based upon that testimony would be constitutionally unconscionable.

It is clear that to allow any unqualified expert to come into the court and establish that allegedly obscene material is beyond the "community standards" would not only have a chilling effect on First Amendment rights but would also raise serious Sixth Amendment problems. Normally, the groups surveyed are not available for cross-examination by the defendant; hence, without the safeguard of a valid survey, the defendant, confronted by an expert who is in effect giving expressions of standards and judgment of the community, is truly forced to contend with nameless and faceless adversaries. This is a serious violation of the defendant's right of confrontation, secured by the Sixth Amend-

ment. *Pointer v. Texas,* 380 U.S. 400 (1965).

V

The Conviction Of Petitioner For Violation Of Penal Code Section 311.2 Was Erroneous Because, As A Matter Of Constitutional Fact, The Materials Were Not Obscene.

The appellate court must, in the course of reviewing the entire record, review the material adjudged obscene by the lower court. *Jacobellis v. Ohio, supra,* 378 U.S. at 188-189; *Zeitlin v. Arneberg,* 59 Cal.2d 901, 909 (1963).

Petitioner argues that, as a matter of law, the constitutionally requisite elements of obscenity were not shown to exist in this case. Thus, petitioner's conviction below violated the First and Fourteenth Amendments.

Three elements must coalesce before material can be held obscene: (1) the dominant theme of the material taken as a whole must appeal to a prurient interest in sex; (2) the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material must be utterly without redeeming social value. *Memoirs v. Massachusetts, supra.*

It is clear that material cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though it is found to possess the requisite prurient appeal and is also found to be patently offensive. Each of the three federal constitutional tests is to be applied independently; social value can neither be weighed against nor cancelled by its prurient appeal or patent

offensiveness. The material must be tolerated even if it is possessed of only a modicum of social value. *Memoirs, supra; Jacobellis, supra; Roth v. United States, supra.*

In this case, it is patently clear that the requisite elements were not established. The prosecution witness testifying as to prurient interest admitted that the material had some beneficial use for normal people (RT, Volume IV, Section II, page 18). Moreover, the prosecution witness testifying as to redeeming social value admitted that the material had some usefulness (RT, Volume III, Section I, pages 86-87).

The prosecution is bound by these statements of its own witness. The prosecution, as a part of its case, presents exculpatory evidence; it is bound by that evidence, and the defense is not required to introduce the same evidence in order to be benefited by it. *People v. Collins,* 189 Cal.App.2d 575, 589, 591 (1961).

It is important to reiterate that it must be found that the material is utterly without socially redeeming value. That was not shown in this case. Moreover, all three elements must be shown. So that if any one fails, the matter must be treated as constitutionally protected.

It was further shown that the prosecution did not meet its burden to show that the material went beyond the standards of the community, both because in this instance the relevant community was the nation, and not the state, *In re Giannini, supra; Jacobellis, supra,* and because even if the state were the right community, Officer Shaidell was not qualified to speak on community standards based on his defective survey.

VI

The Conviction Of The Petitioner Under The Amended Language Of Penal Code Section 311, When The Amendment Was Subsequent To The Offense, Was Constitutionally Defective In That It Was The Application Of An *Ex Post Facto* Law.

The act for which petitioner was indicted took place prior to the amendment of Penal Code Section 311(e). Under the language of the Penal Code in effect at the time of the alleged offense, the relevant language was:

> "Having knowledge that the matter is obscene."

Petitioner was indicted and convicted under Penal Code Section 311(e) when it read:

> "Knowingly means being aware of the character of the matter . . . "

The section was amended on June 25, 1969, Amended Stats. 1969, Chapter 249, Section 1, Page 598.

Under Government Code Section 9605:

> "When a section or part of a statute is amended . . . (n) provisions are to be considered as having been enacted at the time of the amendment."

There is a presumption that any essential change in the phraseology of a statute indicates an intention on the part of the legislature to change its meaning rather than to interpret it. *Todd Estate,* 17 Cal.2d 270 (1941); *Dalton v. Baldwin,* 64 Cal.App.2d 259 (1944); *Coker v. Superior Court,* 70 Cal.App.2d 199 (1945).

Here, the change in the language of the statute was material, in that it made the standard for proving "knowledge"

less stringent. It is clear that the retroactive application of the less stringent standard to the petitioner's trial could only have operated to penalize him.

When the elements of an offense are legislatively changed, as here, and where the alleged offense took place prior to the amendment, the defendant cannot be held to the new standard. This is constitutionally barred by the prohibition against *ex post facto* laws. This is true whether the law is enacted by the federal government, Article I, Section 9(3), or by the state government, Article I, Section 10(1); *Calder v. Bull, supra,* 3 U.S. 386 (1798); *In re Estrada,* 63 Cal.2d 749 (1965). See, also, *Wilke and Holzheiser, Inc. v. Department of ABC,* 65 Cal.2d 349 (1966); California Government Code Section 9608.

A defendant may be given the benefit by a retroactive application of a change in the law, but it is fundamental that he may not be penalized. *In re Estrada, supra; In re Kirk,* 63 Cal.2d 761 (1965).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

BURTON MARKS of
MARKS, SHERMAN, LONDON,
SCHWARTZ & LEVENBERG

A Professional Corporation

Attorneys for Petitioner.

INDEX TO APPENDIX

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., October 12, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP 872 PEOPLE VS MILLER, Marvin

This matter having heretofore been under submission, the Court now rules; the judgment is hereby affirmed and the cause remanded to Municipal Court. ENTERED 10-12-70.

• • • •

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., November 2, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP-872 PEOPLE VS MILLER, Marvin

Petition for rehearing and in the alternative, Petition for certification to the Court of Appeal, Fourth Appellate District having been received and considered, the Court now

rules: the Petitions and each of them are hereby denied. ENTERED 11-2-70.

• • • •

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT AND APPLICATION FOR STAY PENDING APPEAL

In the Appellate Department of the Superior Court, County of Orange, State of California.

No. AP-872 (Lower Court: OCMC, Harbor No. M50760)

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. MARVIN MILLER, Appellant.

Notice of appeal and application for stay pending appeal to the United States Supreme Court is hereby given by Marvin Miller, Petitioner and Appellant herein, from the Order of this Court dated October 12, 1970, by which it affirmed the judgment of the court below. On November 2, 1970, this Court denied Petitioner/Appellant's Petition for Rehearing and in the Alternative, Petition for Certification to the Court of Appeal, Fourth Appellate District.

This Appeal is taken *inter alia* on the following grounds, without intent to enumerate all of his defenses, that Petitioner/Appellant by his appeal and his Petition for Rehearing/Certification:

1. Challenged the constitutionality of the application of a "statewide" standard in judging obscenity under Penal Code § 311.2 under the First and

Fourteenth Amendments;

2. Challenged the constitutionality of the application of an unscientific survey to qualify an expert witness to testify as to the "community standards" requirement in the legal definition of obscenity pursuant to Penal Code § 311.2 in contravention of the First and Fourteenth Amendments;

3. Challenged the prosecution under Penal Code § 311.2 for mailing obscene material as a contravention of the doctrine of Federal Pre-emption and the Supremacy Clause of the United States Constitution.

4. Challenged his conviction under the amended language of Penal Code § 311. as an application of an *ex post facto* law;

5. Challenged his prosecution and conviction for mailing obscene material in that under the Fifth Amendment's prohibition against double jeopardy the state was collaterally estopped from claiming that the material was obscene.

This appeal is being prosecuted pursuant to the authority of Title 28 U.S.C. § 1257(2), and

That the Order of this Court, dated October 12, 1970, and reading as follows: "Affirmed," and the denial of Appellant's Petition for Rehearing/Certification constituted a finding that Penal Code § 311.2 of the State of California was constitutional on its face and as applied, and Appellant hereby gives his Notice of Appeal from that finding.

DATED: November 6, 1970.

MARKS, SHERMAN &
LONDON

BY: BURTON MARKS

Attorneys for Appellant

[PROOF OF SERVICE BY MAIL annexed, showing service on the Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

CECIL HICKS, District Attorney
P. O. Box 808
Santa Ana, Calif.

MUNICIPAL COURT OF THE ORANGE
COUNTY JUDICIAL DISTRICT - HARBOR
567 West 18th Street
Costa Mesa, California 92626.

Executed on November 6, 1970, at Beverly Hills, California.]

• • • •

CALIFORNIA PENAL CODE

§ 311. Definitions

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly

without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing,

speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has

in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to:

A motion picture machine operator acting within the scope of his employment as an employee of any person exhibiting motion pictures pursuant to a license or permit issued by a city or county provided that such operator has no financial interest in his place of employment, other than wages.

• • • •

STATE OF CALIFORNIA)

) ss.

County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on MAY 12, 1971, I served the within BRIEF FOR PETITIONER (NO. 1288) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
600 State Building
Los Angeles, California 90012
(3 copies)

SOLICITOR GENERAL OF
THE UNITED STATES
Washington, D. C. 20543
(3 copies)

DISTRICT ATTORNEY
COUNTY OF ORANGE
700 Civic Center Drive West
Santa Ana, Calif. 92701
(1 copy)

APPELLATE DEPT.
SUPERIOR COURT
ORANGE COUNTY
County Courthouse
Santa Ana, California
(1 copy)

MUNICIPAL COURT - HARBOR JUDICIAL DISTRICT
567 West 18th Street
Costa Mesa, California 92626 (1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 12, 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

D. A. Standefer

Dean-Standefer Co., 322 Main St., Huntington Beach, Calif.
(714) 536-7161